

REMARKS

Claims 1-7 and 9-12 are pending in this application. No claims have been amended, added, or cancelled.

35 U.S.C. §103 Rejections

Independent claim 1 stands rejected under 35 U.S.C. §103(a) for obviousness based upon the Safe-Fence reference in view of the Johnson patent and, now, previously cited U.S. Reissue Patent No. 32,707 to Robbins, Jr., Jr.

The Examiner continues to reject claim 1 on substantially the same grounds as before. Specifically, Applicant's arguments relating to the prior art failing to disclose a rail being "rigid yet manually deformable in the absence of any assembly thereof with the fencing system" have been deemed unpersuasive. The Examiner has invited Applicant to procure the actual Safe-Fence product to "determine the veracity of Applicant's assertions." Accordingly, Applicant has obtained the Safe-Fence product and declares in the enclosed *Declaration Under 37 C.F.R. § 1.132* (hereinafter "the 1.132 Declaration") that in fact, the Safe-Fence rail does not meet the aforementioned claimed rail limitation. Additionally, the 1.132 Declaration discusses the shortcomings of the Safe-Fence invention based upon observations made by Applicant in an expert capacity, as evidenced by Applicant's extensive experience in the fencing industry. Furthermore, Applicant provides substantial sales figures for the claimed invention evidencing commercial success thereof. Applicant states in the 1.132 Declaration that one of the reasons for the commercial success of his fencing system is because of the "overall strength obtained through utilization of a sturdy composite rail in connection with a sturdy metal buckle." Applicant further states that the "metal buckle securely holds the composite railing during tensioning of the railing and in instances when stress is exerted against the railing by livestock" such that this arrangement will not come apart. The requisite nexus, between the claimed invention and the commercial success, is evidenced by ¶ 5 in the 1.132 Declaration.

The Examiner implies that even if the Safe-Fence rail is constructed as stated by Applicant, that the rail limitation of claim 1 would be rejected in view of the Robbins, Jr. patent. Applicant views such a rejection as an indication of improper hindsight reconstruction due to the use of three references (Safe-Fence, Johnson, Robbins, Jr.) and specifically the use of the non-analogous art Johnson reference that Applicant has pointed out

is improper as a matter of law. In the July 10, 2006 Amendment, Applicant set forth non-analogous art arguments and teaching away arguments with respect to combining the teachings of Safe-Fence with those of Johnson. Of note, the Robbins, Jr. patent was previously cited by the Examiner only with respect to the claimed connector of original claims 13-16, which are now withdrawn. The Robbins, Jr. patent was never cited with respect to the overall claimed fencing system of claim 1. By only now applying the teachings of the Robbins, Jr. patent to the claims, even though the Robbins, Jr. patent was available to the Examiner since issuance of the initial first Office Action, it is evident that that Examiner has formed an improper hindsight reconstruction rejection.

The Robbins, Jr. patent simply discloses a composite metal and plastic fence rail that is secured to a fence post by brackets or nails driven into the fence rail. Robbins, Jr. in no way teaches or suggests a buckle according to the present invention. As evidenced by ¶ 3 in the 1.132 Declaration, the use of a composite metal and plastic fence rail is incompatible with the Safe-Fence buckle. Thus, even if one had combined the Robbins, Jr. rail with the Safe-Fence buckle, the result would have been inoperative, thus leading the skilled artisan away from the invention. It has been held that the references used to attempt to obviate a claim must suggest the desirability and thus the obviousness of making the combination (*Hodosh v. Block Drug Co., Inc.*, 786 F.2d 1136, 1143 n.5, 229 USPQ 182, 187 n.5 (Fed. Cir. 1986)). The Robbins, Jr. patent states that with the “use of the brackets of the present invention, the fencing can be suspended between the posts and then subjected to tension to straighten the webbing to a substantially horizontal condition” (See column 5, lines 17-21). Accordingly, it is shown how tensioning is a requisite aspect in the installation of composite fence rails. If the skilled artisan would rely on the teachings of the Robbins, Jr. patent, after securing the composite rail into the Safe-Fence buckle, the skilled artisan would begin to tension the composite rails. However, as indicated by the tests performed by Applicant, any tensioning would result in the buckle collapsing. Therefore, there would be no desirability by one having ordinary skill in the art to use the composite fence teachings of the Robbins, Jr. patent in combination with the teachings of the Safe-Fence buckle, or any other non-composite fence rail application specific buckle. For example, Applicant would like to point out that the Robbins, Jr. fence rail would be incompatible with the Johnson plastic buckle, as a plastic buckle would be susceptible to breaking, especially in the context of tensioning the Robbins, Jr. fence rail.

In any case, Applicant's 1.132 Declaration sets forth the deficiencies of the prior art and the commercial success of the claimed invention.

For the foregoing reasons, the statements set forth in Applicant's 1.132 Declaration, and all of Applicant's arguments made in previous responses, Applicant believes that the subject matter of independent claim 1 and the claims depending therefrom are not rendered obvious by any of the prior art of record. Reconsideration of the rejection of independent claim 1 and the claims depending therefrom is respectfully requested.

CONCLUSION

Based on the foregoing remarks, reconsideration of the rejections and allowance of pending claims 1-7 and 9-12 are respectfully requested.

Respectfully submitted,

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